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Gerald Jensen v. Frank F. Mower : Appellant's Reply Brief

Utah Supreme Court

Louis E. Midgley; Attorney for Defendant and Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

GERALD JENSEN,
Plaintiff and Respondent,

vs.

FRANK F. MOWER,
Defendant and Appellant.

Case No.
8369

APPELLANT'S REPLY BRIEF

LOUIS E. MIDGLEY,
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and Appellant.

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STATEMENT OF FACTS

Appellant's Brief made no mention of the injuries suffered by Respondent, as there is no issue in this Appeal which makes the injuries material.

STATEMENT OF POINTS

POINT I

THE PLAINTIFF IS PRESUMED BY LAW TO BE A GUEST AND NOT A PASSENGER FOR HIRE, AND PLAINTIFF FAILED TO SUSTAIN THE BURDEN OF PROOF NECESSARY TO OVERCOME THAT PRESUMPTION.

ARGUMENT

POINT ONE

The following arguments raised in Respondent's Brief, to which we reply, are three fold. Respondent alleges:

1. The inducement for the rides was the payment of $3.50 per week, and there was a binding contract between the parties, which establishes plaintiff as a passenger for hire.

2. The purpose of the rides was business, not social.

3. There is no relationship between the Guest Statute and the Motor Vehicle Transportation chapter of the Public Utilities Act.

Replying to the first argument above, we submit the following:

Subsection (h) 54-6-12 (pg. 7, App. Brief) presupposes and indeed anticipates a "contract" between the employees to share the actual expenses. The terms of the "contract" are established by Statute, and the usual free enterprise of these parties, *in this particular situation,* has been eliminated by the legislature.

Further, the "inducement" for the ride goes further beyond the plaintiff's payment of his proportion of the expenses; the inducement, more accurately, was the approval of the legislature to all employees, sanctioning the arrangement as long as they conducted themselves within the limitations set out in the exception outlined in subsection (h).

Respondent, furthermore, has failed to carry the test to its conclusion, as overwhelmingly required by the authorities, and that is whether the driver and rider, by the "contract" understood, and the driver acquiesce in the understanding, that the riders would have a status which would entail the liability to a passenger for hire. (pg. 32, App. Brief)

We reiterate our statement at page 33 of Appellant's Brief to clearly show that the parties, and particularly the defendant, would certainly have no such understanding.

If all that were required to establish a passenger

status was the proof of a "contract," there would be very few instances wherein a rider would be a guest.

If I "offer" to drive my wife to the grocery store and she "accepts," the elements of a contract are present. And it takes little imagination to think of a "consideration" sufficient in law to establish the entire "contract" as binding and enforceable. But in the problem at bar, the element lacking, and necessary, is that certainly neither my wife nor I would understand, by the longest stretch of the imagination, that she would be a passenger for hire, rather than a guest.

Everett vs. Burg, 301 Mich. 734, 4 N. W. 2d 63, 146 A.L.R. 639.

> "Practically every interchange of amenities and hospitality when very carefully analized, may appear to be a quid pro quo arrangement, but this does not prevent the relationship from being that of a host and guest."

And in the Everett case above, the Michigan Supreme Court held that the agreement between 6 employees to share the rides to and from work, 5 of whom agreed to drive their cars in turn, and the 6th, who had no car, to pay a weekly sum to the driver, was "simply the exchange of amenities between employees."

Respondent further contends that the arrangement

between the parties was business and not social, and insists that proof of this is found in the fact that the parties had not met before the time the arrangement was made upon their first introduction by a fellow employee.

Does Respondent then claim that friendship starts only after people who have been introduced have in fact known each other for a stated period of time? Does the social nature of a relationship of two employees of a common employer start only when they have attended a social function together? Is it then untrue that the spark of friendship can not in fact ignite upon the first introduction?

What, in fact, is the nature of an automobile ride to and from employment? Is it a business trip in the true sense of the word? The employees are not on duty while traveling to and from work, as evidenced by our Compensation Laws. The automobile expenses of the travel are not recognized by the Internal Revenue Department of the Federal Government, as a deductible business expense. The State of Utah likewise, refuses such expense as deductible from income tax. The trips, then, if not truly "business trips," and if they must be classified, can only be classified as social.

Respondent insists, at page 6 of his Brief, that the test approved by the authorities cited, indicates that if

the carriage tends to the promotion of mutual interests of both passenger and driver, or if it is primarily for the attainment of some objective or purpose of the driver, the passenger is not a guest.

In reciting the above argument, Respondent has bitten his tongue. The rides are neither for the promotion of their mutual interests nor primarily for the objective of the defendant. The fellow employees had a *common interest* in getting to work, but they certainly had no mutual interest in so doing. For example, Wliliams had no "interest," other than perhaps friendly concern, that Mr. Gull be at work, as Mr. Williams would be paid, and would suffer no other detriment to himself, whether Mr. Gull worked or not: And the same thing applies in reverse, and as between any two, or all of the occupants of the car.

> " 'Mutual is not synonymous with "common." The latter word . . . denotes that which is shared, in the same or different degrees, by two or more persons; but the former implies *reciprocal* action or interdependent connection." Black's Law Dictionary, 3rd. Ed.

There is no more mutuality of interest in a group of employees riding to and from work together, than there would be if they were en route to or from a fishing trip, and had agreed in advance to share the actual expenses of the transportation.

Obviously the Respondent cannot claim that the trips were "primarily for the attainment of some objective or purpose of the driver." The Legislature cannot be accused of attempting to benefit the driver-employees as against the employees who ride. Their refusal to allow the driver to make any profit, and their requirement that the drivers pay their share of the expense along with the riders, is conclusive against any such contention.

It needs no argument that the trips were not "primarily for the purpose of getting the defendant to work," but rather, they were "primarily" and solely arranged to get everyone to and from work in as economical and convenient a manner as possible.

The Respondent further argues to the effect that there is no relationship between the Guest and Motor Vehicle Transportation Acts.

In the first place, we wish to correct Respondent on his understanding of our contentions, as recited in pages 11 and 12 of his Brief.

We certainly do not concede that had this accident occurred prior to 1948, plaintiff would have been a passenger for hire. We submit that without the Statutory enactment in 1948, the Courts would be confronted with a closer problem as to whether, in fact, the sums agreed

to be paid, in light with the other facts, constituted " compensation" under the meaning of the Guest Law.

Furthermore, without the statutory exception (h), the parties conceivably would have been free to bargain with each other on the amount to be paid, which may or may not have constituted "compensation" under the particular facts. And under such conditions of freedom, the Court conceivably could take the position, as some Courts have, that *any* consideration, whether 1c or $5.00 would constitute "compensation," inasmuch as the Court generally will not inquire into the adequacy of the consideration.

Under those conditions, whether the driver did or did not secure a license from the Public Utilities Commission would be as immaterial as whether or not he secured a driver's license.

The obvious reply to Respondent's argument is that any two Laws, passed by a State Legislature, covering the subject of motor vehicles, can hardly disclaim relationship to each other when the facts either fall under one Statute or the other. The purposes and meaning of the Legislature, in passing each Act, must then be inquired into.

As one example only, The Safety Responsibility Act, Chapter 12, Title 41, U.C.A. 1953, ties the two above

Acts together, as far as "Relationship" is concerned.

The Safety Responsibility Act, to use very general terms, is a recognition by the Legislature that public policy dictates that the public be protected for injuries or damages suffered as a result of the ordinary negligence of motorists.

The Public Utilities Act, for the same reason, requires financial responsibility on the part of operators of vehicles for hire.

The guest Statute, in effect, provides that guests in a vehicle shall assume the risk of the host's ordinary negligence and, therefore, no financial responsibility, naturally, need be shown.

Thereby lies the relationship.

Did the Legislature then intend to protect the public, *except those employees riding to and from work?* If Respondent's contentions are correct, that question would be answered in the affirmative, for the reasons; (again speaking generally)

1. The general public is protected for the negligence of the private motorist, who must carry liability insurance.

2. Guests, however, must assume the risk, and, therefore, a fortiori, no insurance is required to protect them.

3. Operators of vehicles for hire must carry liability insurance on the vehicle for hire.

4. But employees, under subsection (h), need not carry insurance (except under 1 above), as they are not operating a vehicle for hire.

There are, of course, other reasons why there is a "relationship" between the two Acts in question, but we will not belabor the obvious.

On the other Points at issue, Appellant submits his appeal on his original Brief.

Respectfully submitted,

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